A

AMAT LOYUT & ORS

v.

NG ENG KIAT & ORS

B

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL RAHMAN SEBLI J
[CIVIL SUIT NO: 23NCVC-143-10-2012]
31 MAY 2013

C

LEGAL PROFESSION: *Solicitors - Cost - Personal liability of solicitors for costs - Whether solicitor and counsel guilty of serious professional misconduct - Costs of entire action - Whether solicitor and counsel to bear personally - Whether role of counsel similar to role of barristers in England - Whether counsel exempted from being personally liable for costs - Rules of Court 2012, O. 59 r. 6(1)*

D

The issue for determination was whether the solicitor and counsel acting for the plaintiffs were liable to pay costs personally to the defendants pursuant to O. 59 r. 6(1) of the Rules of Court 2012 ('ROC'). The plaintiffs were 163 Orang Asli from the Jakun tribe who claimed to be the beneficiaries of the trust fund created by a court's order. The state government of Johor had paid out a final sum of RM38.5 million out of which RM22 million was set aside as trust money to be distributed among the beneficiaries. The plaintiffs were represented by Nasir Abdul Aziz ('Nasir') as solicitor and M Mahoharan ('Manoharan') as counsel. The first defendant was the court appointed interim receiver and manager to manage the trust fund. The plaintiffs sought *inter alia* for an order that the first defendant be removed as receiver and manager on the ground that he failed in his duty to look after the interests of the beneficiaries. It was also alleged that the first, seventh, ninth, and fourteenth defendants had conspired to take control of the trust fund to enrich themselves. The defendant's application to strike out the plaintiffs' claim under O. 18 r. 19 of the ROC was allowed with costs. The first, seventh, ninth and tenth defendants asked for costs of the entire action and the striking out applications to be paid by the plaintiffs' solicitor and counsel personally pursuant to O. 59 r. 6(1) of the ROC while the sixteenth and seventeenth defendants were content with the costs of RM5,000 to be paid by the plaintiffs themselves. It was contended that Nasir and Manoharan were guilty of serious

E

F

G

H

I

professional misconduct. When Nasir and Manoharan were called upon to show cause, Nasir applied to discharge his firm from acting as solicitors for the plaintiffs and alleged that the plaintiffs had difficulty of getting instructions from the plaintiffs and that the plaintiffs had intentionally hidden facts from Nasir and Manoharan. Although the case against the defendant had high chances to fail and was caught by the *res judicata* rule and also issue estoppel, Manoharan gave the impression that the Judicial Commissioner of the Johor Bahru High Court had granted leave to the 163 plaintiffs to proceed against all 20 defendants in particular the first, seventh, ninth, tenth and fourteenth defendants. Manoharan had failed to disclose that the leave application had nothing to do with the 19 defendants. On the contrary, Manoharan argued that if at all anyone was to be liable personally for costs, it should be the solicitors and not counsel as O. 59 r. 6(1) of the ROC only spoke of solicitor and not counsel. Manoharan further argued that his role as counsel was equivalent to that of a barrister in England which dealt with the inherent powers of the court over solicitors and had no application on barristers which made barristers in England not liable for costs.

Held (jointly and severally liable pay costs of action):

(1) Before an advocate and solicitor could be ordered to pay costs, O. 59 r. 6(2) of the ROC required that the advocate and solicitor be given a reasonable opportunity to appear before the court and to show cause why the order should not be made against him. The jurisdiction to order a solicitor to pay the costs to the opposing party could only be exercised where it was clear that he was guilty of serious dereliction of duty or serious misconduct and should be exercised with care and discretion. (para 9)

(2) In Malaysia, those who practice law were both advocates and solicitors pursuant to s. 3 of the Legal Profession Act 1976. It was a misconception to say that lawyers in Malaysia were either advocates or solicitors but not both. Although there was no definition of counsel in the Legal Profession Act 1976, it did not mean that an advocate and solicitor of the High Court of Malaya was not subject to O. 59 r. 6(1) of the ROC. It was the duty of counsel to conduct litigation with due propriety. To subject the instructing solicitor to the rule would

effectively give counsel who argued the case a licence to misbehave himself and then when it came to costs the solicitor had to pay the price. That could not be the kind of situation envisaged by O. 59 r. 6(1) of the ROC. (paras 16 & 17)

(3) Counsel who took instructions from another advocate and solicitor could not say that he had no knowledge of the full facts or the strength or weakness of the case. He took the case as he found it and must take equal responsibility if it turned out to be vexatious. His recourse was to disengage himself the moment he found anything amiss with the case including if the case had no chance of success. Therefore it was not fair that costs should be borne by the advocates and solicitors themselves if their advice turned out to be wrong. An advocate and solicitor must get his facts and law right before advising a client to proceed with litigation or to defend an action. (para 18)

(4) Nasir and Manoharan had not discharged their burden of showing to the satisfaction of the court that they had not been guilty of serious professional misconduct. In the circumstances, Nasir and Mahonaran were jointly and severally liable to pay the costs of the entire action to the first, seventh, ninth, and tenth defendants. Nasir had to pay for costs to the fourteenth defendant personally. Costs for the sixteenth and seventeenth defendants were ordered to be borne by the plaintiffs. (para 19)

[Order accordingly.]

Case(s) referred to:

Abdul Malik Abd Majid v. Asnah Hamid & Anor & Another Case [1985] 2 CLJ 364; [1985] CLJ (Rep) 376 HC ***(refd)***

Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 3 CLJ 885 HC ***(refd)***

Amos William Dawe v. Development & Commercial Bank (Ltd) Berhad [1980] 1 LNS 133 FC ***(refd)***

Brown v. Holloway Bros (London) Ltd [1960] MLJ xvi ***(refd)***

Edwards v. Edwards [1958] P. 235 ***(refd)***

Flatman v. J Fry & Co [1957] 1 Lloyd's Rep 73 ***(refd)***

Karpal Singh v. Atip Ali [1986] 2 CLJ 419; [1986] CLJ (Rep) 168 SC ***(refd)***

Kemajuan Flora Sdn Bhd v. Public Bank Bhd & Anor [2005] 4 CLJ 962 HC ***(refd)***

Leonard Nachiappa Chetty [1923] 4 FMSLR 265 ***(refd)***

M I & M Corporation & Anor v. A Mohamed Ibrahim [1964] 1 LNS 105 FC ***(refd)***
Mitra & Co v. Thevar & Anor [1960] 1 LNS 168 CA ***(refd)***
MJH Sdn Bhd v. Jurong Granite Industries Sdn Bhd [1991] 3 CLJ 2885; [1991] 3 CLJ (Rep) 297 HC ***(refd)***
Myers v. Elman [1940] AC 282 ***(refd)***
Orchard v. South Eastern Electricity Board [1987] 1 QB 565 ***(refd)***
Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1993] 2 CLJ 568 HC ***(refd)***
Tan Thian Wah v. Tan Tian Tiok & Ors [1998] 2 CLJ Supp 300 HC ***(refd)***
Thomas v. Attorney-General [1960] 1 LNS 156 HC ***(refd)***
Yonge v. Toynbee [1910] 1 KB 215 ***(refd)***

Legislation referred to:
Legal Profession Act 1976, s. 3
Rules of Court 2012, O. 18 r. 19, O. 59 r. 6(1), (2)
Rules of the Supreme Court 1957, O. 65 r. 11

Other source(s) referred to:
Malaysian Court Practice, 2011 Desk Edn., High Court Practice II, p. 953

For the plaintiffs - Nasir Abdul Aziz; M/s Shahrizal & Nasir - M Manoharan; M/s M Manoharan & Co
For the 1st & 7th defendants - Renu Zechariah (SC Ho with her); M/s Rosley Zechariah
For the 9th & 10th defendants - T Gunaseelan; M/s R Ragumaren & Co
For the 14th defendants - N Navaratnam (Wong Wye Wah with him); M/s Kadir, Andri & Partners
For the 16th & 17th defendants - Lee Chee Tim; SFC, AG's Chambers

Reported by Sandra Gabriel

JUDGMENT

Abdul Rahman Sebli J:

The Issue

[1] The issue for determination is whether the solicitor and counsel acting for the plaintiffs may be made liable to pay costs personally to the defendants pursuant to O. 59 r. 6(1) of the Rules of Court 2012 ('the Rules').

The Facts

[2] The 163 plaintiffs are Orang Asli of the Jakun tribe who claim to be among the beneficiaries of the Trust Fund created by a court order emanating from Originating Summons No: 24-828-1994 between *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885; [1997] 1 MLJ 418, HC; [1998] 2 MLJ 158, CA. On further appeal to the Federal Court the orders of the High Court and Court of Appeal were affirmed. The State Government of Johor had paid out a final sum of RM38.5 million out of which sum RM22 million was set aside as trust money to be distributed among the beneficiaries. In the present suit, which was filed on 17 October 2012 the plaintiffs are represented by Mr Nasir bin Abdul Aziz ('Mr Nasir') of M/s Shahrizal & Nasir as solicitor and Mr M Manoharan ('Mr Manoharan') of M/s M Manoharan & Co as counsel who argued the case.

[3] The first defendant is the court appointed interim receiver and manager to manage the trust fund. The plaintiffs are seeking, *inter alia*, for an order that the first defendant be removed as receiver and manager on the ground that he failed in his duty to look after the interest of the beneficiaries. It is alleged that he is guilty of breach of trust in that he had, amongst other misdemeanours, on his appointment as interim receiver and manager on 11 September 2009 unlawfully withdrawn from the trust account a sum totalling RM331,040.23 which he then paid to the seventh defendant, an exempt private company incorporated under the Companies Act 1965 of which he is a director.

[4] The ninth defendant is an advocate and solicitor and sole proprietor of M/s G Ragumaren & Co, the tenth defendant. He was the solicitor who nominated the first defendant as interim receiver and manager. It is alleged that he and his firm had on 11 September 2009, the date the first defendant was appointed as interim receiver and manager, illegally received a sum of RM60,000 from the first defendant which money came from the trust fund.

[5] The 14th defendant is also an advocate and solicitor and a partner in the legal firm of Chooi & Co. He is currently the president of the Malaysian Bar. He represented the plaintiffs as counsel in Johor Bahru Civil Suit No: 22-228-2009 ('the 2009

suit'). The claim against him, *inter alia*, is that he and the first to 14th defendants had perpetrated and conspired with one another to steal trust money belonging to the trust fund. In short the allegation against the first, seventh, ninth, tenth and 14th defendants is that they had conspired to take control of the trust fund to enrich themselves.

The Application To Strike Out

[6] *Vide* encls. 14, 31, 46, 73 and 81 the first, seventh, ninth, tenth, 14th, 16th and 17th defendants applied to strike out the plaintiffs' claim under O. 18 r. 19 of the Rules. After hearing arguments on 15 April 2013, I allowed their applications with costs. Counsel for the first, seventh, ninth and tenth defendants then asked for costs of the entire action, ie, the suit itself and the present striking out applications to be paid by Mr Nasir and Mr Manoharan personally on the ground that they have been guilty of serious professional misconduct. They asked for a sum of RM30,000 for each defendant. The 14th defendant on the other hand applied for a lesser sum of RM10,000, to be paid personally only by Mr Nasir while the 16th and 17th defendants are content with having costs of RM5,000 to be paid by the plaintiffs themselves.

Personal Liability Of Advocates And Solicitors To Pay Costs

[7] The professional conduct of an advocate and solicitor as an officer of the court is always under the supervision and scrutiny of the court. It follows that when there is dereliction of duty on the part of an advocate and solicitor in the conduct of his professional work the court may, in a proper case, order him to be personally liable for the costs: see *Karpal Singh v. Atip Ali* [1986] 2 CLJ 419; [1986] CLJ (Rep) 168; [1987] 1 MLJ 291, SC. Under O. 59 r. 6(1) of the Rules, a solicitor may be personally liable for costs in any of the following four situations:

(i) where costs are incurred improperly; or

(ii) where costs are incurred without reasonable cause; or

(iii) where costs are wasted by undue delay; or

(iv) where costs are incurred by any other misconduct or default.

[8] The first, seventh, ninth, tenth and 14th defendants are relying on the last of the four situations. There is no rule of thumb as to what amounts to serious professional misconduct. It must depend on the facts and circumstances of each case. In *Mitra & Co v. Thevar & Anor* [1960] 1 LNS 168; [1960] MLJ 79 the Malayan Court of Appeal dealt with the test to be applied when considering whether the misconduct or default of a solicitor is such as to attract the provisions of O. 59 r. 6 (then known as O. 65 r. 11 of the RSC 1957) ie, the test laid down by the House of Lords in *Myers v. Elman* [1940] AC 282 as explained by Sachs J in *Edwards v. Edwards* [1958] P. 235. Thompson CJ in his judgment relied on the following observations by Sachs J in *Edwards v. Edwards*:

> The jurisdiction involved is that discussed in *Myers v. Elman*, where its origin and nature are explained in the speeches of Viscount Maugham, Lord Atkin and Lord Wright. It is there made clear that the jurisdiction is one that the court by virtue of its inherent powers exercises over solicitors in their capacity of officers of the court. The relevant duty of the solicitor covers 'all those against whom they are concerned,' per Lord Maugham. It is a 'duty owed to the court, to conduct litigation before it with due propriety,' per Lord Atkin. The conduct complained of must, before it attracts the above jurisdiction, be such as to 'involve a failure on the part of the solicitor to fulfill his duty to the court to aid in promoting in his own sphere the cause of justice,' per Lord Wright. The jurisdiction is exercised not to punish the solicitor but to protect and compensate the opposite party ... It is, of course, axiomatic, but none the less something which in the present case should be mentioned, that the mere fact that the litigation fails is no reason for invoking the jurisdiction: nor is an error of judgment: nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham, to 'a serious dereliction of duty,' something which justifies, according to other speeches in that case, the use of the word 'gross'... It is also from the authorities clear, and no submission to the contrary has been here made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction.

Precondition For Ordering Advocate And Solicitor To Pay Costs

[9] However, before an advocate and solicitor can be ordered to pay costs, O. 59 r. 6(2) of the Rules requires that the advocate and solicitor be given a reasonable opportunity to appear before the court and to show cause why the order should not be made against him. In *Thomas v. Attorney-General* [1960] 1 LNS 156; [1961] MLJ 111, the Court of Appeal of Sarawak, North Borneo and Brunei held that an order for costs against an advocate should not be made without inquiry and without affording an opportunity to the advocate to show cause. Further, the jurisdiction to order a solicitor to pay the costs of the opposing party could only be exercised where it is clear that he was guilty of serious dereliction of duty or serious misconduct, and should be exercised with care and discretion: see *Malaysian Court Practice* 2011 Desk Edition High Court Practice II at p. 953. The jurisdiction must be exercised sparingly because an advocate and solicitor must be given every reasonable latitude to argue his client's case without having the sword of democles hanging over his head. Where however the circumstances of misconduct are clear the court will not hesitate to exercise the jurisdiction. The following instances have been cited as conduct warranting an order for costs to be paid personally by the solicitor:

(a) Want of authority to act: *Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd* [1993] 2 CLJ 568; [1993] 2 MLJ 26; *Yonge v. Toynbee* [1910] 1 KB 215.

(b) Failing to exercise restraint in incurring costs: *M I & M Corporation & Anor v. A Mohamed Ibrahim* [1964] 1 LNS 105; [1964] MLJ 392.

(c) Failure to attend court for hearing: *Brown v. Holloway Bros (London) Ltd* [1960] MLJ xvi; *Flatman v. J Fry & Co* [1957] 1 Lloyd's Rep 73.

(d) Failure of solicitor to file defence in time: *MJH Sdn Bhd v. Jurong Granite Industries Sdn Bhd* [1991] 3 CLJ 2885; [1991] 3 CLJ (Rep) 297.

A (e) Continuing with the action notwithstanding the bankruptcy of a party: *Amos William Dawe v. Development & Commercial Bank (Ltd) Berhad* [1980] 1 LNS 133; [1981] 1 MLJ 230;

(f) Abatement of suit following death of a party: *Leonard*
B *Nachiappa Chetty* [1923] 4 FMSLR 265.

[10] At the conclusion of argument on costs on 15 April 2013, I found sufficient ground to call upon Mr Nasir and Mr Manoharan to show cause why they should not be ordered to pay costs personally and adjourned the matter to 10 May 2013 to give
C them sufficient time to prepare for their defence. Both had given their joint and common defence on the adjourned date. Essentially their explanation is that none of the allegations made against them by the defendants' counsel has any truth.

D **Whether Circumstances Show Serious Misconduct**

[11] The burden lies on Mr Nasir and Mr Manoharan to show to the satisfaction of the court that they have not been guilty of serious professional misconduct. Counsel for the defendants
E pointed to the following instances of misconduct on the part of Mr Nasir and Mr Manoharan to warrant an order that costs to be paid personally by them:

(1) At the case management on 29 March 2013, the learned
F Deputy Registrar had directed all affidavits in respect of the present striking out applications to be exhausted by 29 March 2013. This was not done by Mr Nasir or his firm. Instead, on the morning of 15 April 2013 when the present striking out proceeding was about to commence he served
G on each of the defendants a fresh affidavit affirmed by the fourth plaintiff on 12 April 2013. No application for extension of time was applied for nor given by the court for this affidavit to be included and read in the proceedings.

(2) At the same case management the learned Deputy Registrar
H had directed parties to file and exchange their respective written submissions by 8 April 2013. The defendants complied with the direction by serving a copy each of their written submissions on Mr Nasir's firm. Mr Nasir on his part only partly complied with the direction. He filed his written
I submissions in court but for reasons best known to himself

he refused to extend a copy of the written submissions to the defendants' counsel, in breach of the direction. No explanation was proffered as to why Mr Nasir resorted to this course of conduct.

(3) Mr Nasir also refused to serve the relevant papers on the first and seventh defendants' appointed solicitors although he knew that the first and seventh defendants were represented by M/s Rosley Zechariah. Instead the documents were served directly on the first and seventh defendants through Mr Nasir's process server. The cause papers were in fact served on the first defendant while he was having lunch at the Mutiara Hotel Johor Bahru on 6 December 2012. The learned Deputy Registrar on 8 January 2013 had to direct Mr Nasir to serve the documents on the first and seventh defendants' solicitors.

(4) Mr Nasir refused to respond to the first and seventh defendants' solicitors' numerous letters and queries pertaining to the case.

(5) Mr Manoharan on his part made misleading and prevaricating assertions in his oral submissions at the hearing of the present applications. I must place on record my personal observations on this matter. On at least two occasions when Mr Manoharan was making his oral submissions all three counsel for the defendants stood up spontaneously and in unison to protest against what Mr Manoharan was telling the court, giving me the distinct impression that what Mr Manoharan had said must have been something so untruthful as to touch on their raw nerves. Mr Manoharan should have at least apologised after it was pointed out to him that what he was saying was untrue. Instead he persisted with his statements.

(6) Mr Nasir and Mr Manoharan persisted in pursuing the plaintiffs' claim against the defendants when they knew or ought to have known that it has no or substantially no chance of success. It is the defendants' case that the matters in the action are clearly bound by *res judicata* and barred by issue estoppel arising from the numerous failed

attempts by the plaintiffs to remove the first defendant as receiver and manager. It has been held that solicitors may be personally liable for costs of the action by reason of its vexatiousness: see *Tan Thian Wah v. Tan Tian Tiok & Ors* [1998] 2 CLJ Supp 300; [1998] 5 MLJ 801. In *Orchard v. South Eastern Electricity Board* [1987] 1 QB 565 it was held by the English Court of Appeal as follows:

> no solicitor or counsel should lend his assistance to a litigant if he is satisfied that the initiation or further prosecution of a claim is *mala fide* or for an ulterior purpose or, to put it broadly, if the proceedings would be, or have become, an abuse of the process of the court or unjustifiably oppressive.

(7) The present action was filed on 17 October 2012 despite the fact that the trial of the 2009 suit, which raises the same issues is currently ongoing before another Johor Bahru High Court. This is an abuse of process and an interference with the due administration of justice. The motive can only be to derail or delay the trial of the 2009 suit.

(8) While the present suit is pending disposal, the plaintiffs filed an Originating Summons at the Kuala Lumpur High Court *vide* Originating Summons No: 24NCVC-2983-11-2012 ('the KL summons') and named only the 18th defendant, Kanawagi Seperumaniam as the sole defendant. The subject matter of the KL summons is the same as that of another Kuala Lumpur High Court action, namely Suit No: 22NCC-1512-09-2011, which has in fact been consolidated with the 2009 suit (which is now currently being tried and part heard in Johor Bahru). Surreptitiously a Consent Order was secured on 10 December 2012 in respect of the KL summons despite the fact that the subject matter of the summons is currently being tried in the 2009 suit. To compound the matter Mr Nasir and Mr Manoharan chose to hide this fact from the court's knowledge. It was counsel for the first and seventh defendants who pointed the matter out to the court during argument. Mr Nasir was afforded an opportunity to explain why he filed the KL summons but he failed and refused to offer any explanation.

(9) The plaintiffs relied on the affidavit of the fourth plaintiff Jasni bin Amat affirmed on 29 October 2012 to oppose the defendants' applications. This affidavit was filed by Mr Nasir's firm M/s Shahrizal & Nasir and contains 213 paragraphs. There is no indorsement on the affidavit that the contents had been explained to and understood by the fourth plaintiff. This is strange as the fourth plaintiff, as is the case with all the other 162 plaintiffs, is illiterate and uneducated as admitted by Mr Manoharan himself. It is unbelievable that Mr Nasir had allowed the fourth plaintiff to swear to the truth of the affidavit without having the contents explained to him. Mr Manoharan's argument that he should not be blamed if the affidavit contains any untruth as he is merely counsel arguing the case and not the solicitor who prepared the affidavit is unacceptable. It is a myth to say that counsel has no means of knowing if any part of any affidavit that he relies on in his argument contains any untruth.

It is counsel's duty to investigate every material assertion in any affidavit to be used in any court proceeding and not to allow the deponent to make whatever averment he thought fit without regard for the truth. It needs no emphasis that at any stage of any court proceeding only the truth is to be told and counsel as an officer of the court has a duty to ensure that only truth be told. The least that is expected of Mr Manoharan as counsel was to ask the plaintiffs to confirm if every material assertion of fact in the fourth plaintiff's affidavit is true to the best of their knowledge. If the plaintiffs insisted on swearing to matters which the solicitor and counsel knew to be wrong or imperfect or false, the right thing for Mr Nasir and Mr Manoharan to do as officers of the court would have been to withdraw from the case at the earliest possible moment. Instead Mr Nasir and Mr Manoharan plodded on with the case and treated the contents of the fourth plaintiff's affidavit as gospel truth.

Both the statement of claim and the affidavit of the fourth plaintiff contain an allegation of fraud against the ninth defendant. Specifically it is alleged that the ninth defendant had fraudulently obtained the thumbprints of 78 of the

plaintiffs and misrepresenting to them that they would get higher monthly allowances from the trust money. It is also alleged that he and the eighth defendant had falsified court documents. These are grave allegations which should never have been made without sufficient basis. In this regard the following observations by Shankar J in *Abdul Malik Abd Majid v. Asnah Hamid & Anor & Another Case* [1985] 2 CLJ 364; [1985] CLJ (Rep) 376; [1985] 2 MLJ 459 are relevant:

> It seems to me appropriate here to say that solicitors and counsel who make such charges in their pleadings and in Open Court do so at their peril. Their duty as officers of the Court, and to all concerned, is not discharged merely by saying that they were instructed to do so. *Odger's on Pleadings and Practice* is perhaps the most elementary book on the subject. In the 20th Edition at page 206, he spells out Counsel's duty as follows:
>
> > Counsel must insist on being fully instructed before placing a plea of fraud on the record. Such a plea should never be provided on insufficient material, nor without warning to the client, if appropriate, that by adopting such an aggressive line of defence he may double or treble the amount of damages which he may ultimately have to pay.
>
> Reference may also be made to Lord Denning's pronouncements in *Associated Leisure Limited v. Associated Newspaper Limited* at p. 456.
>
> It is the view of this Court that it should be a salutary practice in Malaysia if hereafter solicitors who are instructed to make such charges first obtain proof of their client's instructions in writing and get the same verified in the form of a Statutory Declaration so that they are not left high and dry when the time comes to justify their conduct in Court. In the present case no evidence whatsoever was led in support of numerous allegations contained in Dagang's statement of claim.

(10) One week from the date Mr Nasir and Mr Manoharan were called upon to show cause on 15 April 2013, Mr Nasir *vide* encl. 110 applied to discharge his firm M/s Shahrizal & Nasir from further acting as solicitors for the plaintiffs. In his affidavit in support affirmed on 23 April 2013 he asserts that

he had difficulty getting instruction from the plaintiffs right from the start ("daripada mula hingga sekarang"). He further alleges that the plaintiffs had intentionally hidden facts from his knowledge. He did not say though what those 'hidden facts' are. Despite having insufficient and hidden facts, Mr Nasir and Mr Manoharan pursued the case with vigour. This is conduct unbecoming of officers of the court.

(11) The first and seventh defendants' complaint is that the nature of the allegations launched against them in the statement of claim and by way of affidavit prepared by their solicitor were scandalous, without proof, had no basis and must have been based on advice given by Mr Nasir and Mr Manoharan. The complaint is not without basis, given the fact that the plaintiffs are illiterate and uneducated. For myself I have grave doubts if the fourth plaintiff even knew what exactly he was averring to on behalf of himself and on behalf of the other 162 plaintiffs in his affidavit.

(12) Mr Nasir had written a letter dated 26 December 2012 to the Chief Justice YAA Tun Arifin bin Zakaria, the Chief Judge of Malaya YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinuddin and the Johor Courts Managing Judge YA Datuk Ramly bin Haji Ali adverting to the scandalous matters raised in these proceedings and stating in the same letter that the first defendant had withdrawn RM5.9 million trust monies when these allegations have been proven to be untrue in the previous proceedings. It is highly improper for the solicitor to write this kind of letter when the trial is ongoing, more so when the allegations are baseless.

[12] In *Kemajuan Flora Sdn Bhd v. Public Bank Bhd & Anor* [2005] 4 CLJ 962 the High Court ordered costs to be borne personally by the plaintiffs' solicitors as it was found that there was:

> ... an indefatigable initiative and endless effort on the part of the plaintiff's solicitors who were so insistent in bringing litigation with no regard as to any merit whatsoever, thereby resulting in the consistent and persistent dismissals with the plaintiff being mulcted in costs ... There can be no doubt that costs have been incurred improperly or without reasonable cause or wasted within the ambit of Order 59 r. 8(1).

[13] The above case dealt with wasted costs but in my view it also applies to cases involving serious professional misconduct, such as the present case. The first, seventh, ninth, tenth, and 14th defendants' argument is that the plaintiffs' case against them is doomed to fail and that Mr Nasir and Mr Manoharan are fully cognizant of this fact. In rebuttal Mr Manoharan pointed out that Judicial Commissioner YA Gunalan Muniandy of the Johor Bahru High Court had granted the plaintiffs leave to proceed with the present suit and that therefore it was incorrect for the defendants to say that the plaintiffs' case has no chance of success. The clear impression that Mr Manoharan gave was that leave was granted to the 163 plaintiffs to proceed against all 20 defendants, including in particular the first, seventh, ninth, tenth and 14th defendants. What Mr Manoharan failed to disclose however is the fact that leave was only granted in respect of the first defendant and that the leave application had nothing to do with the other 19 defendants. It is clear that Mr Manoharan was being less than candid in his submissions. It was I would say with regret an attempt at concealment of a material fact. In any event I am with the defendants on the point that the plaintiffs' case is doomed to fail as it is caught by the *res judicata* rule and also issue estoppel. This is a case that has no or substantially no chance of success and is conspicuously unmaintainable.

[14] As a matter of fact the complaints raised in the plaintiffs' statement of claim had been raised and argued to the point of exhaustion and more importantly had been determined by the High Court in Johor Bahru Suit No: 22-228-2009 ('the 228 suit') as well as by the Court of Appeal and the Federal Court by way of the following proceedings:

(a) the counterclaim filed by the plaintiffs in the 228 suit which was struck out;

(b) the *inter partes* hearing of the first defendant's application, which was dismissed by the High Court but allowed by the Court of Appeal and the Federal Court;

(c) the 18th defendant's and the Tok Batin's application to set aside the *ex parte* order appointing the first defendant as receiver and manager, which was dismissed by the High Court and upheld by the Court of Appeal;

(d) the application to replace the first defendant with Amanah Raya Berhad as receiver and manager, which was dismissed by the High Court and upheld by the Court of Appeal;

(e) the application to appoint the Director of Lands and Mines to replace the first defendant as receiver and manager, which was dismissed by the High Court (there was no appeal).

Whether Solicitor Or Counsel Liable For Costs

[15] Mr Manoharan submitted that if at all anyone is to be held personally liable for costs, it should be the solicitor and not counsel. In other words it is Mr Nasir who should be held liable, not him. According to Mr Manoharan the court will be setting a dangerous precedent if it were to hold counsel personally liable for costs. He pointed out that O. 59 r. 6(1) of the Rules only speaks of 'solicitor' and not counsel and that therefore *Myers v. Elman* (*supra*) relied upon by the defendants has no relevance for the reason that the position in England is different in that there is no fusion between solicitor and barrister. He told the court that barristers in England are not liable for costs.

[16] I believe the point that Mr Manoharan is trying to drive home is that his role as counsel is equivalent to that of a barrister in England and that therefore *Myers v. Elman*, which dealt with the inherent powers of the court over solicitors (and not barristers) has no application, meaning to say being the equivalent of an English barrister he is not liable for costs. With due respect I fail to see any *sequitur* to the argument. The simple truth is that in Malaysia, those who practice law are both advocates and solicitors of either the High Court of Malaya or the High Court of Sabah and Sarawak. It is a misconception to say that lawyers in Malaysia are either advocates or solicitors but not both. Herein lies the fallacy of Mr Manoharan's argument. Under s. 3 of the Legal Profession Act 1976 a solicitor of the High Court of Malaya is defined as follows:

> "advocate and solicitor" and "solicitor" where the context requires means an advocate and solicitor of the High Court admitted and enrolled under the Act or under any written law prior to the coming into operation of this Act.

[17] There is no definition of 'counsel' as such but it does not mean that an advocate and solicitor of the High Court of Malaya (of which Mr Manoharan is one) is not subject to O. 59 r. 6(1) of the Rules. It is the duty of counsel to conduct litigation with due propriety. To subject only the instructing solicitor to the rule would effectively be to give counsel who argues the case a licence to misbehave himself and then when it comes to costs, it is the solicitor alone who must pay the price. That cannot be the kind of situation envisaged by O. 59 r. 6(1).

[18] In any event counsel who takes instructions from another advocate and solicitor cannot be heard to say that he has no knowledge of the full facts or the strength or weaknesses of the case. He takes the case as he finds it and must take equal responsibility if it turns out to be vexatious. His recourse as mentioned earlier is to disengage himself the moment he finds anything amiss with the case or that on a proper assessment the case has no or substantially no chance of success. Litigants rely on the legal advice of their advocates and solicitors to assess their chances. Therefore it is only fair that costs shall be borne by the advocates and solicitors themselves if their advice turn out to be plainly wrong, using the standard of a reasonably competent and skilful advocate and solicitor as a yardstick. An advocate and solicitor must get his facts and the law right before advising his client to proceed with litigation or to defend an action. He must not act merely and solely on the basis of his client's wish without regard for the truth. After all lawyers are supposed to uphold the truth.

Conclusion

[19] Having given due consideration to the allegation of misconduct by the first, seventh, ninth, tenth and 14th defendants and the joint explanation by Mr Nasir and Mr Manoharan, I was not satisfied that they had discharged their burden of showing to the satisfaction of the court that they have not been guilty of serious professional misconduct. In the circumstances, I held them to be jointly and severally liable to pay the costs of the entire action to the first, seventh, ninth and tenth defendants. As for the 14th defendant since he only asked for costs to be paid personally by Mr Nasir, I ordered that only Mr Nasir was to pay the costs personally. The 16th and 17th defendants did not apply for costs

to be paid personally by both solicitor and counsel. Therefore costs for the 16th and 17th defendants were ordered to be borne by the plaintiffs themselves. With regard to the sums asked for by the first, seventh, ninth, tenth and 14th defendants respectively I am of the view that they are fair and reasonable having regard to all the circumstances of the case.

[20] For the avoidance of doubts the terms of the order on costs are as follows:

(1) RM30,000 to be paid forthwith jointly and severally by Mr Nasir and Mr Manoharan to each of the first, seventh, ninth, and tenth defendants.

(2) RM10,000 to be paid forthwith by Mr Nasir to the 14th defendant.

(3) RM5,000 to be paid forthwith to the 16th and 17th defendants by the plaintiffs.